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**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

MAX RUHLMAN and ERIC SAMBOLD,

Plaintiffs,

v.

GLENN RUDOLFSKY, individually, and  
DBA HOUSE OF DREAM KAUAI and  
HOUSE OF DREAMS HAWAII; KIM D.  
RUDOLFSKY, AKA KIM DAPOLITO,  
individually; and DBA HOUSE OF  
DREAM KAUAI and HOUSE OF  
DREAMS, HAWAII,

Defendants'.

**CASE NO.: 2:14-cv-00879-RFB-NJK**

**REPLY IN SUPPORT OF MOTION TO  
STRIKE MATTERS OUTSIDE THE  
PLEADINGS**

Defendants', Glenn Rudolfsky (hereinafter "Mr. Rudolfsky") and Kim Rudolfsky (hereinafter "Mrs. Rudolfsky") (hereinafter collectively the "Defendants"), by and through their undersigned counsel,<sup>1</sup> file this Reply in Support of their Move to Strike.

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<sup>1</sup> Plaintiffs apparently believe it is pejorative to incorrectly characterize Defendants as having "engaged the Chicago firm of Howard and Howard to file a Motion to Dismiss . . ." Doc. 52 at 2:2-4. While it is unclear why, even if true, this information might sway the Court, in case the matter is of import, the undersigned counsel hopes the following explanation will satisfy any inquiry. First, the undersigned counsel has been licensed to and has practiced law in Nevada since 1994 <http://www.nvbar.org/lawyer-detail/7052> (last visited December 10, 2015). Second, Howard & Howard is, in fact, a law firm founded in 1869 in Kalamazoo, Michigan. It is now based in Royal Oak, Michigan with offices in Las Vegas, Nevada, Ann Arbor, Michigan, Chicago, Illinois, and Peoria, Illinois. <http://h2law.com/en/contact/> (last visited December 10,

**POINTS AND AUTHORITIES****I. THE INSTANT MOTIONS IS NOT PROCEDURALLY INCORRECT**

Plaintiffs suggest that the instant motion is not procedurally correct. They suggest that Judge Dorsey held as much in the unreported case of HPEV, Inc. v. Spirit Bear Ltd., No. 2:13-CV-01548-JAD, 2014 WL 6634838, at \*5 (D. Nev. Nov. 21, 2014). In fact, Judge Dorsey did not hold any such thing. At most, she suggested that “[t]he term ‘strike’ is a misnomer[,]” but recognized the Court could “disregard” certain matters in pleadings. Id. (“Although I could exercise my discretion to disregard this argument because of its timing, I choose instead to disregard it because I conclude it is not pertinent to my analysis. Accordingly, the motion to ‘strike’ is denied.”) If the Court concludes that the use of the word “strike” is misplaced, Defendants invite the Court to consider this as a request that the Court disregard the improper reference to matters outside the pleadings presented by Plaintiffs.

Plaintiffs, however, failed to alert the Court to a published case coming to a different conclusion than their narrative that the instant motion is improper. The Court in Collins v. Palczewski, 841 F. Supp. 333, 335 (D. Nev. 1993) failed to express any disapproval of the use of a “Motion to Strike” in these circumstances and concluded in that case that it would “not consider” exhibits, of which it noted the “the vast majority of materials are outside the face of the pleadings.” Id. This Court is therefore not foreclosed from considering this motion. Whether it does so to “strike” or to simply “disregard” the improper documents is of no import, but the documents are not proper and should not be considered.

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2015). The Las Vegas office was opened in 2005 and now employs 18 attorneys. [http://h2law.com/en/people/atty\\_GroupResults.aspx?SearchType=8&relateID=300](http://h2law.com/en/people/atty_GroupResults.aspx?SearchType=8&relateID=300) (last visited December 10, 2015).

1 **II. DEFENDANTS DID NOT “INVITE CONSIDERATION OF MATTERS**  
2 **OUTSIDE THE PLEADINGS”**

3 Plaintiffs suggest Defendants invited this Court to consider matters outside the pleadings.  
4 This argument has no merit. Plaintiffs argue Defendants’ submission of “156 pages of documents  
5 outside the pleadings as exhibits to their first and second Motions to Dismiss” somehow opens  
6 the door to Plaintiffs to submit documents outside the pleadings in response to the instant motion.  
7  
8 Doc. 52 at 2:19-20. This claim deserves some analysis, but is fatally flawed.

9 **A. The Court Must Allow Matters Outside The Pleadings On A Motion to Dismiss**  
10 **For Lack Of Jurisdiction**

11 Defendants’ Motion to Dismiss Plaintiffs’ Complaint for Lack of Personal Jurisdiction  
12 and Forum Non Conveniens (Doc. 14) properly submitted matters outside the pleadings, as the  
13 same are appropriate in such circumstances. Plaintiffs do not deny the Ninth Circuit has long  
14 held that for the purposes of considering a motion to dismiss on the grounds of subject matter  
15 jurisdiction, a court may consider matters outside the pleadings. See generally Association  
16 of American Medical Colleges v. U.S., 217 F.3d 770, 778 (9th Cir. 2000). “There never has  
17 been any serious doubt as to the availability of extra-pleading material on these motions.” Michel  
18 v. Am. Capital Enterprises, Inc., 884 F.2d 582 (9th Cir. 1989) (quoting 5 C. Wright & A. Miller,  
19 Federal Practice and Procedure: Civil § 1366, at 676 (1969) (footnote omitted)).

20  
21 That fact does not allow the Court to thereafter consider those same documents on a Rule  
22 12(b)(6) motion, however. The Court may similarly entertain a motion for injunctive relief and  
23 thereafter consider a Rule 12(b)(6) without considering the matters once before the Court. See  
24 Santa Monica Community College v. Mason, 952 F.2d 407, 1991 WL 270727, \*3 (9th Cir. 1991)  
25 (concluding that the submission of declarations and exhibits from a motion for preliminary  
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1 injunction to the court on a motion to dismiss constitutes submission of matters outside the  
2 pleadings). Again, Plaintiffs fail to refute this clear Ninth Circuit law.

3  
4 Several courts have entertained such motions at the same time (motion to dismiss for lack  
5 of jurisdiction and for failure to state a claim) and have allowed the outside documents for  
6 jurisdictional purposes, but refused to allow them for the Rule 12(b)(6) purposes. U.S. E.E.O.C.  
7 v. Pioneer Hotel, Inc., No. 2:11-CV-1588-LRH-RJJ, 2013 WL 129390, at \*2 (D. Nev. Jan. 9,  
8 2013) reconsideration denied, No. 2:11-CV-1588-LRH-GWF, 2013 WL 3353389 (D. Nev. July  
9 2, 2013) (considered matters outside pleadings when determining Motion to Dismiss for lack of  
10 jurisdiction, but refused to consider regarding Rule 12(b)(6) for failure to state a claim upon  
11 which relief may be granted); Osborn v. United States, 918 F.2d 724, 729 (8th Cir. 1990). When  
12 a defendant files a motion on 12(b)(2) and 12(b)(6) grounds, the court may consider extra-  
13 pleading material when determining whether it has personal jurisdiction over Defendants' but  
14 exclude the same evidence from consideration of whether the complaint states a claim, even when  
15 the two questions turn on the same issue. Stewart v. Screen Gems-EMI Music, Inc., 81 F. Supp.  
16 3d 938, 951 (N.D. Cal. 2015) (citing Righthaven, LLC v. Va. Citizens Def. League, Inc., No.  
17 1:10-cv-01783-GMN, 2011 WL 2550627, at \*6 & n. 1 (D. Nev. June 23, 2011) (considering a  
18 declaration in the context of determining personal jurisdiction but not to determine the  
19 sufficiency of the complaint); High v. Choice Mfg. Co., No. C-11-5478- EMC, 2012 WL  
20 3025922, at \*4-6 (N.D. Cal. July 24, 2012) (where both personal jurisdiction and the sufficiency  
21 of the complaint both turned on the question of alter ego, considering extra-pleading evidence  
22 with respect to the 12(b)(2) challenge but excluding the extra-pleading evidence from the  
23 12(b)(6) analysis); Abosakem v. Royal Indian Raj Int'l Corp., No. C-1001781 MMC, 2011 WL  
24  
25  
26  
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635222, at \*10 n. 7 (N.D. Cal. Feb. 11, 2011) (considering a declaration in the context of determining personal jurisdiction but not to determine the sufficiency of the complaint)).

Plaintiffs ignore these authorities as well, apparently conceding there are two separate and distinct standards for determining these two types of motions. The instant matter, pursuant to Rule 12(b)(6), does not envision consideration of matters outside the pleadings, while jurisdictional motions allow matters outside the pleadings. The fact that the Court heard the jurisdictional matter first does not now allow Plaintiffs or the Court to ignore the constructs of Rule 12(b)(6).

**B. The Three Documents Attached To Defendants' Motion To Dismiss Are Not Outside The Pleadings**

Plaintiffs complain that Defendants attached three exhibits to the Motion to Dismiss (Doc. 48) regarding the "bridge mortgage," yet admit their Complaint **references** the same "bridge mortgage" at Paragraph 18. Doc. 52 at 6:5-9. Defendants did attach to their Motion to Dismiss, documents which were referred to in Plaintiffs' Complaint. When doing so, Defendants informed the Court and Plaintiffs that the same were not matters outside the pleadings. The Court's attention is invited to Doc. 48, footnote 3 on page 3, line 28. It provides:

See Exhibits 1-3 attached hereto and incorporated herein by this reference. Documents referenced in a complaint are not considered matters outside the pleadings. See In re: Silicon Graphics Inc. Securities Litigation, 183 F.3d 970, 986 (9<sup>th</sup> Cir. 1999).

Plaintiffs apparently concede this point, as they failed to address it in their opposition. Indeed, it is incontrovertibly established law in this District and in the Ninth Circuit that documents **referenced** in a complaint are not considered matters outside the pleadings. Venetian Casino Resort, L.L.C. v. Cortez, 96 F. Supp. 2d 1102, 1106 (D. Nev. 2000) (While a district court must normally ignore those matters that lie outside the pleadings, it may consider: (1) documents

1 physically attached to the complaint, see Durning v. First Boston Corp., 815 F.2d 1265, 1267  
 2 (9th Cir.), cert. denied, 484 U.S. 944, 108 S.Ct. 330, 98 L.Ed.2d 358 (1987); (2) documents of  
 3 undisputed authenticity that are alleged or referenced within the complaint, see Parrino v. FHP,  
 4 Inc., 146 F.3d 699, 706 (9th Cir. 1998); Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994);  
 5 and (3) public records and other judicially noticeable evidence, see Barron v. Reich, 13 F.3d  
 6 1370, 1377 (9th Cir. 1994); MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir.  
 7 1986)). Since Plaintiffs admit that the mortgage documents are referenced in the Complaint,  
 8 their attachment to the Motion does not violate any prohibition, and will not convert the motion  
 9 to one under Rule 56.  
 10

11  
 12 Unfortunately, Plaintiffs failed to cite to this controlling law, instead arguing that  
 13 Defendants use of the documents excuse Plaintiffs' response with documents of their own.  
 14 Doc. 52 at 6:3-15. In doing so, however, Plaintiffs unwittingly make Defendants' case for  
 15 them. Since the matters presented are not outside the pleadings, Plaintiffs are not allowed to  
 16 respond with documents of their own. Plaintiffs correctly cite Crockett and Meyers v. Napier,  
 17 Fitzgerald and Kirby, 401 F. Supp. 2d 1120 (D. Nev. 2005) for the proposition that "[o]nly in  
 18 cases in which the moving party submits nothing outside the pleadings with a 12(b)(6) motion  
 19 can the moving party complain when the non-moving party responds with documentary  
 20 exhibits." Doc. 52 at 6:3-11.  
 21

### 22 23 **III. DEFENDANTS PROVIDED THE COURT WITH ADEQUATE REASON TO** 24 **STRIKE OR DISREGARD**

25 Plaintiffs argue Defendants have made no showing of an adequate basis for the Court  
 26 striking or disregarding. Plaintiffs then proceed to re-argue their opposition to the Motion to  
 27 Dismiss. Defendants decline to engage the same, instead invite the Court's attention to their  
 28 briefing on that matter, which they incorporate herein for this purpose.

1 The Court should note, however, that Plaintiffs' constant refrain that the attached  
 2 documents don't contain "redundant, immaterial, impertinent, or scandalous" material is a classic  
 3 red herring. The ruse is no doubt an attempt to distract the Court from the inescapable conclusion  
 4 that Plaintiffs have improperly attached matters outside the pleadings in response to a Rule  
 5 12(b)(6) motion to dismiss.  
 6

7 **IV. THE COURT SHOULD NOT CONVERT THE MOTION TO ONE FOR**  
 8 **SUMMARY JUDGMENT**

9 As has been demonstrated herein, Defendants' submission of exhibits does not  
 10 constitute attaching matters outside the pleadings. Defendants therefore object to the Court  
 11 considering any matter outside the pleadings, thereby converting this matter to one for  
 12 summary judgment. Moreover, Plaintiffs' assertion that the matter has already been  
 13 converted and that Defendants are under sufficient notice already to require the matter to be  
 14 considered under Rule 56, is misplaced. The argument relied for its premise on Plaintiffs'  
 15 faulty assertion that Defendants attached matters outside the pleadings. Having dispensed  
 16 with this red herring, the Court must consider the uncontroverted caselaw requiring  
 17 additional notice before the Court can rule on a summary judgment basis.  
 18

19 Plaintiffs apparently concede that in the Ninth Circuit, "a motion to dismiss is not  
 20 automatically converted into a motion for summary judgment whenever matters outside the  
 21 pleading happen to be filed with the court and not expressly rejected by the court." North  
 22 Star Int'l v. Arizona Corporation Comm'n, 720 F.2d 578, 582 (9th Cir. 1983) (holding that  
 23 district court properly treated motion as motion to dismiss, despite presence of affidavits,  
 24 where there was no indication of the court's reliance on outside materials and the court  
 25 expressly stated that it was dismissing for failure to state a claim upon which relief could be  
 26 granted); Keams v. Temple Technical Institute, Inc., 110 F.3d 44, 46 (9th Cir. 1997)  
 27  
 28

1 (“12(b)(6) motion need not be converted into a motion for summary judgment when matters  
 2 outside the pleading are introduced, provided that ‘nothing in the record suggest[s] reliance’  
 3 on those extraneous materials.”). Rather, “a district court must take some affirmative action  
 4 to effectuate conversion.” Swedberg v. Marotzke, 339 F.3d 1139, 1142 (9th Cir. 2003).

6 Once the Court decides to accept any matter outside the pleadings, Rule 12 requires  
 7 conversion to summary judgment treatment. Wright & Miller, *supra*, at § 1366. Further, it is  
 8 reversible error for the Court to consider matters outside the pleadings without converting  
 9 the matter to one with summary judgment treatment. *Id.* Thus, as the Second Circuit noted,  
 10 the court errs when it “consider[s] affidavits and exhibits submitted by Defendants’ in  
 11 support of a motion to dismiss.” Kopec v. Coughlin, 922 F.2d 152, 155 (2d Cir. 1991).

13 Conversion to summary judgment in this matter would not be appropriate at this stage  
 14 of the litigation. Courts have recognized that the exercise of discretion to grant summary  
 15 judgment treatment of a motion to dismiss where no little or no discovery has been  
 16 conducted by the parties is not warranted and would be improper. Brennan v. Nat’l Tel.  
 17 Directoy Corp., 850 F. Supp. 331 (E.D. Penn. 1994) (citing Brug v. The Enstar Group, Inc.,  
 18 755 F.Supp. 1247, 1251 (D. Del. 1991); Ospina v. Dept. of Corrections, 749 F.Supp. 572,  
 19 574 (D. Del. 1990)(citing Melo v. Hafer, 912 F.2d 628, 634 (3rd Cir.1990), *affd*, 502 U.S.  
 20 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991)). Conversion to summary judgment treatment  
 21 would be improper here because no reasonable opportunity has been given to Defendants’  
 22 to obtain and submit the additional evidentiary materials needed to counter a summary  
 23 judgment motion. 27A Fed. Proc., L. Ed. § 62:611. The Ninth Circuit has recognized that  
 24 granting summary judgment without allowing any discovery is error. See generally  
 25 Alghanim v. Boeing Co., 477 F.2d 143, 148, n.9, 149 (9th Cir. 1973) (Rule 56(f) motion  
 26  
 27  
 28

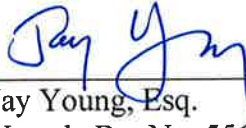
1 should have been granted to permit plaintiff time to file personal affidavit from residence in  
2 Kuwait; additional discovery allowed “(i)nasmuch as further proceedings must be had...”).  
3 Further, other circuits agree. Egelston v. State Univ. College at Genesco, 535 F.2d 752, 754  
4 (2nd Cir. 1976) (dismissal of a sex discrimination case without allowing plaintiff any  
5 discovery was error); Ward v. United States, 471 F.2d 667, 670 (3rd Cir. 1973)(Rule 56(f)  
6 motion should have been granted where there had been no discovery at all on critical  
7 negligence issue).  
8

9  
10 **V. CONCLUSION**

11 For the reasons stated hereinabove, Defendants respectfully request that the Court grant the  
12 instant motion.

13 DATED this 14<sup>th</sup> day of December, 2015.

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**CERTIFICATE OF SERVICE**

Pursuant to Fed.R.Civ.P. 5(b), I certify that on the 14<sup>th</sup> day of December 2015, I cause the foregoing REPLY IN SUPPORT OF MOTION TO STRIKE MATTERS OUTSIDE THE PLEADINGS, be to be served by electronically transmitting the document to the Clerk's Office, using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following registrants:

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4828-8687-8507, v. 1

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